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No. 85-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEMPLE UNIVERSITY – OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION AND BRIEF FOR JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jersey Shore Medical Center-Fitkin Hospital hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The interest of Jersey Shore Medical Center-Fitkin Hospital in this case arises from the fact that it is a party to a case presently pending in the United States District Court for the District of New Jersey in which the same issue is before the court, namely, whether the Internal Revenue Service should refund FICA taxes paid on salary reduction amounts used for the purchase of Section 403(b) annuities. [*Jersey Shore Medical Center-Fitkin Hospital, et al. v. U.S.A.* (No. 84-2704-AET)]. Jersey Shore Medical Center-Fitkin Hospital is vitally interested in the instant matter. The Court's decision in this petition will be dispositive of its suit.

In the instant case petitioner does not mention the fiscal impact of the Court's decision. Congress and the majority in the Court of Appeals below were concerned about the financial impact of a taxpayer favorable decision. The brief which *amicus curiae* is requesting to file will discuss this issue.

WHEREFORE, it is respectfully requested that the Court grant movant leave to file the attached brief as *amicus curiae* in this matter.

Respectfully submitted,

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May 27, 1986

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BRIEF FOR JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL

Jersey Shore Medical Center-Fitkin Hospital is a not-for profit corporation that is exempt from Federal income tax but is subject to Social Security ("FICA") taxes.

Jersey Shore Medical Center-Fitkin Hospital is a party to litigation in the United States District Court for the District of New Jersey involving essentially the identical legal question presented by this case. [*Jersey Shore Medical Center-Fitkin Hospital et al. v. U.S.A.* (No. 84-2704-AET)]. Jersey Shore Medical Center-Fitkin Hospital seeks refunds of FICA taxes paid on salary reduction amounts for the purchase of Section 403(b) annuities. In the Jersey Shore Medical Center-Fitkin Hospital situation, as here, the refunds have been denied upon the authority of Revenue Ruling 65-208. The instant petition will be dispositive of Jersey Shore Medical Center-Fitkin Hospital's suit.

SUMMARY OF ARGUMENT

Temple University is entitled to the refunds it seeks because salary reduction contributions used for the purchase of Section 403(b) annuities [Section 403(b) of the Internal Revenue Code of 1954, as amended ("Code"), (26 U.S.C. Section 403(b)] were not wages for FICA [Federal Insurance Contributions Act ("FICA"), 26 U.S.C. Section 3101 *et seq.*] tax purposes when they were paid. The longstanding Congressional intent to exclude these amounts from FICA taxation, the legislative repetition of that intent in 1958 that there be no distinction between salary reduction and salary supplement amounts, the unsupportable adoption of Revenue Ruling 65-208, 1965-2 C.B. 383, and the variance by the Internal Revenue Service ("I.R.S.") in its treatment of "wages" for income tax purposes as opposed to FICA tax purposes compels this result.

The majority below acknowledges that the prospective change in the definition of "wages" [to tax contributions made to Section 403(b) plans funded by amounts paid by virtue of salary reduction agreements] contained in the Social Security Amendments of 1983 [P.L. 98-21, 97 Stat. 122 (1983)] was not made retroactive by the Deficit Reduction Act of 1984, P.L. 98-369, 98 Stat. 494 (1984).

The Court below erred by rewriting the statute to make the 1984 legislation retroactive. To reach its result that the amounts paid prior to the change in the law were taxable, the Court below impermissibly supplied language to the statute that Congress had not.

ARGUMENT

POINT I

THE COURT BELOW ERRED BY FINDING THAT THE 1984 ACT SERVES TO PRECLUDE THE REFUND SOUGHT HERE WHEN THE DEFINITION OF "WAGES" SUBJECT TO FICA TAXATION AT ALL TIMES EXCLUDED PAYMENTS MADE FOR RETIREMENT ANNUITIES AND WAS NOT CHANGED RETROACTIVELY.

Our system of government is based upon the constitutional mandate of separation of powers. That Congress cannot retroactively overrule the Supreme Court is fundamental.

In *Ogden v. Blackledge*, 2 Cranch 272, 277, 2 L.Ed. 276, 278 (U.S. 1804), the Court stated: "[T]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial."

A current Congress cannot retroactively override prior Congressional action and intent when that action and intent is clear and unambiguous, especially where the Supreme Court of the United States has already defined that prior Congressional intent. This Court must reverse the decision below because the majority below has done just that.

During the period at issue, Section 3121(a)(2) of the Code and its predecessor sections excluded payments made to Section 403(b) tax sheltered annuities from taxes under FICA. This evidenced a longstanding Congressional intent to exclude these payments and to encourage retirement savings. This section of the Code was not changed until the Social Security Amendments of 1983, *supra*. The definition of wages was changed *prospectively only*, not retroactively.

It is the government's position that these employer contributions for the purchase of Section 403(b) annuities are not "wages"

for income tax withholding purposes. Revenue Ruling 53-181, 1953-2 C.B. 111, and Revenue Ruling 65-209, 1965-2 C.B. 414. On the other hand, the I.R.S. also takes the position that any salary reduction portion of an employer contribution for the purchase of a Section 403(b) annuity is to be considered "wages" for FICA purposes, while any salary supplement portion is not to be considered "wages" for FICA purposes. Revenue Ruling 65-208, *supra*. This position is contrary to the definition of "wages" in Section 3121 of the Code and clear Congressional intent dating back to 1939.

In *Rowan Companies, Inc. v. Unites States*, 252 U.S. 247 (1981), this Court found that the plain language and legislative history of the enactment of the definition of wages for FICA, FUTA [Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. Section 3301, *et seq.*] and income tax withholding purposes showed that Congress intended that each mean the same thing. The Court stated, at 252 U.S. 257: "[I]t would be extraordinary for a Congress pursuing this interest . . . (of coordinating the income-tax withholding system with FICA and FUTA) . . . to intend, without ever saying so, for identical definitions to be interpreted differently." Rather, "[T]he plain language and legislative histories of the relevant Acts indicate that Congress intended its definition to be interpreted in the same manner to FICA and FUTA as for income-tax withholding."

The instant case closely parallels the situation in *Rowan*. There is no evidence in either the statutes or the legislative history to suggest that Congress intended for there to be a different definition of "wages" for income tax withholding purposes than for FICA purposes within the purview of Section 403(b) of the Code.[1] Further, the Code definitions for "wages" for income tax, FICA and FUTA purposes at all relevant times were almost identical.

In *Rowan*, this Court explicitly stated that the longstanding Congressional policy was that there be no variance between the

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[1] In fact, as set forth *infra*, it is clear that Congress excluded contributions to these plans from the definition of "wages" for FICA purposes.

treatment of "wages" for income tax purposes and the treatment of "wages" for FICA tax purposes. Here, Congress actually changed the intent of prior Congresses going back to 1939. The 1984 legislation is doubly offensive because the 1984 Congress spoke for a prior Congress when no Congress has such power, and its enunciation of that prior Congress' policy was contrary to not only the prior Congressional policy but to the Supreme Court's declaration of what the consistent prior legislative policy had been.

In 1939, Congress provided that amounts used to purchase retirement annuities were to be excluded from FICA taxation [Social Security Act Amendments of 1939, P.L. 76-379, Section 209, 53 Stat. 1360, 1373].

The legislative history shows that Congress wanted no distinction to be made between salary supplement and salary reduction agreements.

Judge Weis stated below at 769 F.2d 126, 136:

> "The House Report articulated the reason for excluding from FICA wages, among other items, payments by an employer to purchase retirement annuities: 'This will save employers time and money but what is more important is that it will eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.' H. Rep. No. 728, 76th Cong., 1st Sess. *reprinted in* 1939-2 Cum. Bull. at 543."

The enunciated Congressional purpose in 1939 was to encourage retirement savings by not taxing monies used to purchase retirement annuities.

In Revenue Ruling 53-181, *supra*, the Internal Revenue Service interpreted the law as it applied to charitable institutions.

The statutes as they existed at that time, make clear that monies used to fund annuities were exempt from FICA tax. The I.R.S. followed this in its Revenue Ruling 53-181, *supra*.

Changes to the tax treatment of Section 403(b) plans provided by the 1958 amendments (P.L. 85-866, 72 Stat. 1620-1622), are convincing. The legislative intent shows that there was to be absolutely no distinction between salary supplement and salary reduction funding. The Committee report states:

> "The regulations under present law (sec. 1.403(a)-1(3)) provide that an annuity contract purchased by an exempt organization qualifies provided the purchase of the annuity is 'merely a supplement to past or current compensation.' Among the factors mentioned as to whether an annuity contract is a 'supplement to past or current compensation' is whether the annuity contract is purchased as a result of an agreement for a reduction of the employee's salary or whether it is purchased at his request instead of an increase in current compensation to which he otherwise might be entitled. In such cases the regulations state that the amount paid for the contract is to be considered current compensation. Your committee intends the objective 20 percent rule set forth above as a complete substitute for these rules in the regulations. . . ."

Senate Report No. 1983, 85th Cong., 2nd Sess., *reprinted in* U.S. Code Cong. & Ad. News, 1958, Vol. 3 pp 4824-4825.

Up to this point, and reaffirmed by the 1958 legislative history, there was no distinction between salary reduction and salary supplements used to fund retirement annuities.

Unlike other types of retirement plans, Section 403(b) plans can only be funded by annuities - there is a strong interplay between Section 403(b) and Section 3121 of the Code.

In 1965, Revenue Ruling 65-208, *supra*, was promulgated. The Revenue Ruling did not validly reflect the plain language, origin or purpose of the definition of wages in Section 3121(a) of the

Code.[2] The government has justified neither its basis in law nor its authority for the adoption of Revenue Ruling 65-208.[3]

In *Canisius College v. United States of America* [Slip Opinion, February 28, 1986, Hon. John T. Elfvin, W.D.N.Y., appeal docketed, United States Court of Appeals for the Second Circuit, No. 86-6065 (reproduced in appendix hereto)], the Court found that "[O]nly upon the emergence of concern for the stability of the FICA wage base was this contrary ruling promulgated. . . . This Court agrees that it is inappropriate to attempt to legitimatize Revenue Ruling 65-208 based upon the financial state of the national system of social insurance in 1965, 1983 or 1984 or upon Congress' 1983 and 1984 debates, reports and enactments

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[2] The Revenue Ruling is contrary to Treasury Regulation 31.3121(a)(2)-(1)(d), 26 C.F.R. Section 31.3121(a)(2)-(1)(d) providing:

> "It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in taxing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service."

[3] The legislative history of the 1983 legislation shows that Congress considered that these amounts were not taxable.

The Conference Report of the Social Security Amendments of 1983 acknowledged that the "*present law*" (as of March 4, 1983) provided that these contributions were FICA tax exempt. The report states:

> "Subject to certain limitations, amounts paid by the employer for the purchase of a tax-sheltered annuity for an eligible employee *are excluded from the employee's taxable income and social security wage base*. Tax-sheltered annuities may be purchased for employees of educational institutions and certain tax-exempt organizations. Tax-sheltered annuities may be purchased pursuant to a salary reduction agreement." (Emphasis added). (House-Conference Rep. No. 98-47, 98th Cong., 1st Sess. 146 (1983), *reprinted in* U.S. Code Cong. & Ad. News., May 1983, Vol. 2, p. 436.)

amending the relevant law. It is therefore found that Revenue Ruling 65-208 did not validly reflect the plain language, origin or purpose of Section 3121(a)." [Slip opinion at p. 5][*]

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[*] The *Temple* decision also expresses unnecessary concern over the impact of a taxpayer favorable decision to the Social Security system. The experience of *Rowan* refunds is instructive in this regard. Initially, the I.R.S. had estimated that refunds in excess of $2 billion would result from the *Rowan* decision. The I.R.S. later announced that it had agreed to $91 million in refunds plus interest and that claims from 230,000 employers had been received. It then forecast a total of claims from 500,000 employers that would bring the amount of refunds to $285 million plus interest. (See December 15, 1982, *The Wall Street Journal*, p. 1, col. 5) Similarly, in the instant matter the dollar impact alluded to by the majority herein is not as significant as might first appear. Upon information and belief, less than 100 employers have filed suits for these refunds. The Statute of Limitations for 1982 claims expired on April 15, 1986. Congress has barred claims for refunds after 1983. Upon information and belief, approximately $50 million of refund claims are at stake. This is significantly less than the $1 to $2 billion which was potentially refundable.

POINT II

CONGRESS VIOLATED THE CONSTITUTION BY RETROACTIVELY OVERRULING THE *ROWAN* DECISION AND BY RETROACTIVELY CHANGING EARLIER LEGISLATIVE POLICY.

The government's reliance upon the 1983 and 1984 legislation to preclude the refunds herein is unsupportable.

Congress did two things in the 1983 Social Security Amendments: First, it changed the definition of wages subject to FICA tax to include retirement plans and contributions funded through salary reduction agreements in the FICA wage base. P.L. 98-21, Section 324(a)(2), adding 26 U.S.C. 3121(a)(5)(E), now 26 U.S.C. 3121(a)(5)(D); second, in direct response to the variance in the definition of wages found prohibitive by *Rowan*, Section 328(b)(1) of the Amendments added language which allowed the I.R.S. to interpret "wages" for income tax purposes differently from wages for FICA purposes (the "Rowan decoupler").

The Deficit Reduction Act of 1984, P.L. 98-369, Section 2662(g), 98 Stat. 494, 1160, amended the 1983 Act by changing the effective date of the *Rowan* decoupling provision to "apply to remuneration . . . paid after March 4, 1983, and to any such remuneration paid on or before such date which the employer treated as wages when paid."

It is not disputed, nor can it be, that the change in the definition of "wages" contained in the 1983 Amendments was *not* made retroactive by the 1984 Congress. Yet the Court below reached its result as if it had been.

This is not so much a matter of retroactive taxation as it is of a retroactive change in a longstanding legislative policy, which policy was unambiguous and which was repeated by this Court in *Rowan*. This is a case of a 1984 Congress attempting to speak

for several prior Congresses and saying that the 1965 Revenue Ruling comported with prior law, when, in actuality, it did not and was the exact opposite of prior law.

This action by Congress is not permissible curative legislation. (See Justice White's dissent in the denial of certiorari in *Van Emmerik v. Janklow*, 454 U.S. 1131, 1132, 102 S.Ct. 986, 987, 71 L.Ed. 2d 285, 286 (1982), quoting *United States v. Heinszen & Co.*, 206 U.S. 370, 374, ". . .the legislature may 'cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights'.")

Here, however, there has been an impermissible retroactive change in a legislative policy dating back to 1939.

The action of the 1939 Congress was clear, the 1984 Congress cannot *retroactively* change longstanding contrary Congressional policy.

Rowan teaches that absent Congressional intent to the contrary, there cannot be a difference in the treatment of the definition of wages for FICA purposes. There was no change in the 1939 Congressional intent to exclude these contributions from FICA taxation until the 1983 Social Security Amendments. The 1939 statute is controlling for the period at issue. Here, the 1984 Congress attempted to reach back to 1939 to not supply, but rather change, the intent to exclude these amounts from FICA taxation. This cannot be done.

CONCLUSION

The decision below was reached by the majority notwithstanding the longstanding Congressional intent to exclude these amounts from FICA taxation, and that there be no distinction between salary reduction and salary supplement amounts. The unsupportable adoption of Revenue Ruling 65-208; the impermissible variance by the I.R.S. in its treatment of "wages" for income tax purposes as opposed to FICA tax purposes; and the retroactive overruling of the *Rowan* decision; together with the number of pending suits involving the same issue, necessitates resolution by this Court.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 27, 1986

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CANISIUS COLLEGE,

Plaintiff,

—vs—

UNITED STATES OF AMERICA,

Defendant.

CIV-84-1126E

MEMORANDUM and ORDER

The plaintiff ("Canisius") seeks a refund of Federal Insurance Contribution Act ("FICA") contributions made in 1980 and the defendant has moved and the plaintiff has cross moved for summary judgment.

The facts are not in dispute. Canisius is a non-profit educational institution exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code. In 1980 Canisius had in effect an employee retirement annuity plan of a type described in 26 U.S.C. §403(b). Under such plan certain employees agreed to accept wage reductions in exchange for Canisius's purchase of annuity contracts on their behalves. Pursuant to section 403(b), the cost or value of the contracts was excludable from the employees' 1980 gross income for federal withholding tax purposes. No question appears to exist concerning Canisius's eligibility to develop or implement such a plan or concerning the propriety of excluding the cost or value of the annuities from the participating employees' gross income for federal income tax withholding purposes.

In contrast to the treatment of such employer contributions for income tax purposes, the amounts used to purchase annuities had been declared in Revenue Ruling 65-208, 1965-2 Cum. Bull. 383, to be includable in the FICA wage base. In compliance with such ruling, Canisius withheld taxes from its employees' wages based upon such inclusion. Canisius also paid the corresponding FICA taxes imposed on it as an employer as measured by the FICA taxable wage bases of its employees.

In 1981 the United States Supreme Court decided *Rowan Cos. v. United States* ("*Rowan*"), 452 U.S. 247, which held that "wages" must be consistently interpreted for federal income withholding and for FICA purposes. *Id.* at 263.

In light of such holding, Canisius sought the refund of employer and employee FICA taxes for the 1980 tax year together with statutory interest on behalf of itself and a number of its employees who had participated in the salary reduction annuity plan. In a letter dated April 30, 1984 the Director of the Massachusetts Service Center of the Internal Revenue Service notified Canisius that the refund request had been disallowed in full based upon Revenue Ruling 65-208.

Canisius alleges in this action that "wages" subject to FICA taxation, despite Revenue Ruling 65-208, at all times excluded the payments made for retirement annuities. 26 U.S.C. §3121(a), promulgated in 1939, defines "wages" subject to FICA taxes. That subsection, as it existed during the 1980 tax year at issue in this action, included as wages

> "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash ***."

The statute excluded from the definition of wages

> "the amount of any payment (including the amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents

> under a plan or system established by an employer which makes provision for his employees generally *** on account of – (A) retirement ***." 26 U.S.C. §3121(a)(2).

The definition of wages for federal income tax withholding purposes is almost identical to that used to define wages for FICA purposes. *See Rowan, supra,* at 255. Section 403(b), using language very similar to that used in subsection 3121(a)(2), provides the basis for excluding under particular circumstances the value of an employer purchased annuity from an employee's federal income tax wage base.[1] Section 403(b) has been held to exclude from the federal income tax wage base both amounts contributed by an employer in addition to an employee's regular salary and amounts contributed in lieu of the employee's salary pursuant to a salary reduction plan. *See Temple University v. United States*, 769 F.2d 126, 133 (3rd Cir. 1985). Despite the similarity between sections 403(b) and 3121(a)(2), Revenue Ruling 65-208 held that the latter excluded from the FICA wage base only salary supplements used to purchase retirement annuities and not salary reduction amounts used to purchase such annuities.

As in the court of appeals decision in *Rowan* it is possible to rationalize the disparate treatment given salary reduction and retirement annuity purchase plans under the federal withholding and FICA schemes if one looks to the different purposes of FICA and federal income tax. A lesson of *Rowan*, however, is that, absent express congressional intent to the contrary, the term wages is to be interpreted in the same manner for FICA purposes as for income tax withholding purposes. Nevertheless and despite

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[1] Section 403(b) provided that, if an annuity contract is purchased for an employee by an employer described in section 501(c)(3) which is exempt from tax under secton 501(a) and the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, then amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year.

the language used in *Rowan*, the present action may be distinguished on the basis that the federal income tax statute at issue in *Rowan* excluded certain income from taxable wages and it was found that such exclusion was reflected in the FICA wage base calculation. Here, the federal income tax statute involved merely defers federal income tax liability and such deferment cannot be reflected under the present FICA scheme. The definition of FICA wages, unlike the federal income tax withholding definition of wages, does not include the value of annuity disbursements. This Court finds, however, that it is not called upon to decide whether the holding in *Rowan* requires that the definition of wages applied in deferring taxes on income produced by an employer's purchase of annuities must be applied to the definition of FICA wages.

In *Rowan* the question was the validity of a Treasury regulation. In the case at bar, this Court must initially focus on the validity of a revenue ruling. Although a Treasury regulation merits greater deference from a court, a revenue ruling is entitled to substantial deference and has "the force of legal precedents unless unreasonable or inconsistent with the provisions of the Internal Revenue Code." *Dunn v. United States*, 468 F.Supp. 991, 993 (S.D.N.Y. 1979). In evaluating the reasonableness of a regulaton or ruling, a court must determine whether it "harmonizes with the plain language of the statute, its origin, and its purpose." *See Rowan, supra*, at 253, *quoting from National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979).

The plain language of section 3121(a)(2) made no distinction between wage supplement and wage reduction amounts used by an employer to purchase annuities on account of an employee's retirement. As is noted in Judge Weis's dissent in *Temple University v. United States, supra* at 126, 136-137, the legislative history of the section and the administrative application of the section demonstrate that no distinction had been made between supplemental and reduction amounts until 1965. Only upon the emergence of concern for the stability of the FICA wage base was this contrary ruling promulgated. Although the ruling has been consistently interpreted since its publication, that consistency

and Congressional reliance upon its validity do not themselves serve to justify its unreasonable interpretation of the statute. This Court agrees that it is inappropriate to attempt to legitimatize Revenue Ruling 65-208 based upon the financial state of the national system of social insurance in 1965, 1983 or 1984 or upon Congress's 1983 and 1984 debates, reports and enactments amending the relevant law. It is therefore found that Revenue Ruling 65-208 did not validly reflect the plain language, origin or purpose of section 3121(a).

In 1983, however, apparently spurred by the decision in *Rowan*, Congress enacted the Social Security Amendments Act of 1983, ("the 1983 Act"), Pub.L. No. 98-21, 97 Stat. 65. The 1983 Act made two relevant changes to section 3121(a). It deleted the reference to "retirement" plans in the list of exclusions from the FICA wage base in the section and added subsection 3121(a)(5)(E)[2] which excludes from the FICA wage base any employer payment

> "under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement ***."

The 1983 Act, in effect, codified Revenue Ruling 65-208. Section 327(b) of the 1983 Act also added, after what is now 26 U.S.C. §3121(a)(20), a sentence which states that:

> "Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from 'wages' as used in such chapter shall be construed to require a similar exclusion from 'wages' in the regulations prescribed for purposes of this chapter."

The sentence appears to serve to counteract the *Rowan* decision by expressly decoupling the FICA and federal withholding tax definitions of wages.

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[2] Now codified as 26 U.S.C. §3121(a)(5)(D).

The 1983 Act leaves no doubt that the type of claim presently before this Court was to be foreclosed. The amendments went into effect on January 1, 1984 and thus do not, by themselves, apply to Canisius's claim that FICA taxes paid in 1980 should be refunded.

In the Deficit Reduction Act of 1984 ("the 1984 Act"), Pub.L. No. 98-369, 98 Stat. 494, Congress changed the effective date of section 327(b) of the 1983 Act. It made the FICA and federal income tax wage definition decoupling provision applicable to

> "remuneration *** paid after March 4, 1983, and to any such remuneration paid on or before such date which the employer treated as wages when paid." *Id.*, §2662(g).

The 1984 Act, however, did not expressly provide that the 1983 amendments to section 3121(a)'s definitions of wages were to be applied retroactively.

As noted in *Temple University v. United States, supra*, the legislative history of the 1984 Act reveals that it clearly had been Congress's purpose to foreclose the granting of refunds in cases such as the one presently before this Court. Despite the fact that the 1984 Act failed to make the 1983 Act's definition of the FICA wage base under section 3121(a) expressly retroactive to 1980, this Court finds that it serves to preclude the refund sought here. *Id.* at 132-133. The 1984 Act, therefore, had the effect of making the value or cost of employer purchased retirement annuities in this action taxable as part of an employee's FICA wage base.

Canisius alleges that the retroactive effect of the 1983 Act and the 1984 Act unconstitutionally overruled *Rowan*. That case however, did not, as Canisius contends, invalidate Revenue Ruling 65-208. As noted above, even after *Rowan*, a substantial question remained whether the reasoning in that decision provided a basis upon which to invalidate the distinction made between sections 403(b) and 3121(a)(2). In 1983 and 1984, Congress acted to codify the distinction before the question was answered. The amendments, therefore, did not unconstitutionally overrule *Rowan*.

Canisius also claims that the retroactive force of the 1983 Act and the 1984 Act violate the due process clause of the Fifth Amendment. As it notes, the United States Supreme Court has states that in cases such as this one "it is necessary to consider the nature of the tax and the circumstances in which it was laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938). Neither the highest court nor any intermediate federal court has adopted an absolute time limit on retroactivity. *Temple University v. United States*, *supra* at 135. Instead, a test for determining whether the retroactive application is so harsh, arbitrary or unfair so as to violate due process rights is "whether this taxpayer has had its expectations as to taxation unreasonably disappointed." *Wilgard Realty Co. v. Commissioner of Internal Rev.*, 127 F.2d 514, 517 (2d Cir., 1942). It was additionally noted therein that "retroactive taxation is not so arbitrary and oppressive as to be unconstitutional if it is no more burdensome than the taxpayer should have expected it to be when he did the thing which created the tax liablility" and that "when it is not, whether the period of retroactivity is comparatively long or short is of little consequence provided it isn't too long to be within reason." *Ibid.* The standard of oppressiveness is thus one of degree.

The five-year retroactive period in this case is relatively long. *See Welch v. Henry, supra; United States v. Hudson*, 299 U.S. 498, 501 (1937); *Purvis v. United States*, 501 F.2d 311 (9th Cir. 1974), *cert. denied* 420 U.S. 947 (1975); *Wilgard Realty Co. v. Commissioner of Internal Rev., supra.* A number of other factors convince this Court, however, that Canisius's due process rights had not been violated. Revenue Ruling 65-208 had been consistently applied since its publication in 1965 to include salary reduction amounts as wages and Canisius had complied with that ruling's interpretation of section 3121(a)(2) through the 1980 tax year. Its expectations would reasonably include the continued validity of the ruling. The decision in *Rowan*, while perhaps marginally changing Canisius's expectations, did not provide it with any certain right to a FICA tax refund. In addition, the 1983 Act and the 1984 Act were merely curative in the sense that

they sought to foreclose the possibility that *Rowan* would affect the rationale and effectiveness of Revenue Ruling 65-208. These factors persuade this court that the retroactive legislation did not unreasonably disappoint Canisius's expectations as to its FICA tax liability. The legislation, therefore, was not so oppressive so as to violate its due process rights.

Accordingly, it is hereby ORDERED that Canisius's motion for summary judgment is denied and that the defendant's motion for summary judgment is granted.

Dated: Buffalo, N.Y.
February 28, 1986

s/ John T. Elfvin
U.S.D.J.